Appeal Board/Agency Shop Developments – 2004

Public Employment Relations Commission
Appeal Board

Don Horowitz
Counsel

2003 Agency Shop Cases: The Circuits' Judicial Mechanics Fine Tune a Classic *Hudson*

This month's issue of *Hot Rod* magazine, a publication I have not purchased in many years, has a story on the restoration of *Hudson* automobiles manufactured in the 1940s and 1950s. According to the article the *Hudson Hornet* was a dominant car on the then new NASCAR circuit in the early 1950s, buzzing past its top rival, the Oldsmobile 88.

A half century later, public sector unions trying to administer agency shop agreements were occasionally "stung" by interpretations of *Chicago Teacher's Union v. Hudson*, 475 *U.S.* 292 (1986) in litigation conducted on different circuits of the federal appellate court system. Almost 20 years old, *Hudson*, more of a staple than a classic, holds that the constitution requires that a union representing public employees must give nonmembers subject to agency shop fees (1) an adequate explanation of the basis for the fee, (2) a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and (3) an escrow for the amounts reasonably in dispute while such challenges are pending.

To meet the first requirement the Court held that the Union "need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." Because *Hudson* involved a "local union" representing 27,500 employees, in cases where the organization at the bottom of the affiliation ladder (national, state, local), is relatively small, unions have lately defended attacks on their *Hudson* notices by arguing that an audit, the top level of financial proof, is not constitutionally required. Not surprisingly recent cases, some of which also apply *Lehnert v. Ferris Faculty Association*, 500 *U.S.* 507 (1991) to resolve chargeability issues, have not always yielded consistent results.

Public Sector

***Harik v. Cal. Teachers Ass'n,* 326 *F.*3d 1042 (9th Cir. 2003) *cert.* den. sub. nom. *Sheffield v. Aceves,* 124 *S. Ct.* 429 (2004)**

The United States Court of Appeals for the Ninth Circuit reviews standard accounting procedures in a case challenging the adequacy of *Hudson* notices. It holds that while a local union cannot presume that its percentage of nonchargeable costs will be less than that of its state and national affiliates, independent expense verification, though not necessarily a formal audit, is required.

The smallest locals in the case did not use external review. The court holds that independent review is necessary, but observes that small unions can devise "flexible and creative" independently verifiable methods to provide nonmembers with adequate information, "without depleting the union coffers."

Reviewing verification requirements the court explains that there are normally three levels of review of financial records: "compilation," where the accountant's financial statement, relies on the union's records, without expressing any opinion as to their accuracy or completeness; "review," where, after examining records and based on the representations of the union's financial officers, a limited assurance is issued stating that the accountant is unaware of any material changes needed to meet accepted accounting principles; and an "audit," the highest level of financial scrutiny. Consistent with its prior rulings the court holds that school superintendents are not liable for inaccuracies in financial statements provided by majority representatives to non-members.

***Otto v. Pennsylvania State Education Association*, 330 *F.*3d 125 (3rd Cir 2003), *cert.* den. 2003 *U.S. LEXIS* 8020 (2003)**

The Third Circuit finds no flexibility in *Hudson*'s audit requirement based on the number of employees a majority organization represents. In the latest decision in this dispute, originally filed in 1996, the Court addresses both *Hudson* (i.e. collection procedures) and *Lehnert* (chargeability) issues. Discussing the three levels of financial scrutiny, the Third Circuit holds that a local union, regardless of size, must verify its expenditures by an independent audit. In *Harik*, the Ninth Circuit defined "small locals" as having between $50K and $100K in revenues. Reviewing Ninth Circuit and other federal and state court cases, the Third Circuit reads *Hudson* to require an

independent "audit" in all cases and finds no room to except small local affiliates. The court also applies *Hudson* in ruling that the plaintiffs had standing to file the lawsuit despite their failure to file an objection with the union at the time fee collections began.

The court rules in favor of the Unions on the *Lehnert* issues. Noting that the National Education Association and its affiliates "pool" their resources, the Court holds that costs incurred outside the bargaining unit can be chargeable if the expenses are germane to collective-bargaining activity. It also rules that a union representing more than one unit, can include, in the fair-share fee assessed to non-members in one, costs associated with litigation stemming from representation of the other unit even where the bargaining units are in different industries (educators and health care professionals).

***Wagner v. Professional Engineers in California Government,* 354 *F*.3d 1036 (9th Cir. 2004)**

The Ninth Circuit reviews a district court's grant of a refund of fees to nonmembers who successfully argued that the union's *Hudson* notice was inadequate. The appeals court reverses the remedy holding that the proper relief would have been to direct the union to issue a corrected notice and allow the objectors to object and seek a refund.

The district court held that the union's notice listed as chargeable lobbying expenses which *Lehnert* ruled were chargeable to nonmembers. Despite the union's concession that it was not entitled to collect for such activities, the Court reversed the holding, finding that the nonmembers were "judicially estopped" from raising chargeability claims because they had asserted that they were not pursuing chargeability claims. A separate opinion disagrees with the estoppel ruling holding that the deficient notice and the chargeability claims were both relevant to claims asserting that the union had not complied with *Hudson*.

***Swanson v. University of Hawaii Professional Assembly,* 212 *F.R.D.* 574, 2003 *U.S. Dist. LEXIS* 4258 (D Haw. 2003)**

***Swanson v. University of Hawaii Professional Assembly,* 2003 *U.S. Dist. LEXIS* 11659; 172 *L.R.R.M.* 2740 (D Haw. 2003)**

In the first case, the Court certified a class of former, current, and future University of Hawaii employees represented in a faculty unit by the University of Hawaii Professional Assembly who are not, were not, or will not

be members of UHPA, and are subject to an agency shop fee equal to regular union dues.

In the second case, the plaintiff, acting as a class representative, filed a civil rights action alleging that the majority representative had not complied with *Hudson* because its notice: did not state the amount of the fee; identify the major categories of union expenditures; explain in an understandable manner how expenditures had been allocated between chargeable and nonchargeable components; show that they had been properly audited; and required that an internal union procedure be exhausted before a nonmember could appeal to an impartial decision-maker. The suit also alleged that because rebates would not be expected until a year after a request was made the system did not meet *Hudson*'s reasonably prompt requirement.

The Court found that the plaintiff was reasonably likely to prevail on its assertions that the notice was inadequate because it did not contain the amount of the fee, an allocation between chargeable and non-chargeable expenses and the expenditures were not independently verified. The Court also held that the refund procedure was not reasonably prompt. The procedure provided that the Hawaii Labor Relations Board would be the impartial decision maker. The Court held that no showing had been made on whether that procedure would produce a reasonably prompt decision.

***Robinson and Dino v. Pennsylvania State Corrections Officers Association*, 2004 *U.S. Dist. LEXIS* 610; 174 *L.R.R.M.* 2261 (M.D. PA 2004)**

After replacing a previously decertified union and pursuant to a contract the Association negotiated with the Commonwealth, fair share fees were deducted from the salaries of nonmembers. The Associations set the fee by reviewing the expenses of its predecessor but it did not send out a *Hudson* notice. Nonmembers were certified as a class and sued. The Association asserted that as a new union it had no history of expenditures on which to base its fee and should be relieved of providing a *Hudson* notice for its initial collection of fair share fees.

The court disagreed finding no basis for a "new union exception" to *Hudson*. Noting that an advance notice breaking down union expenses was constitutionally required, the court held that if a union does not or cannot provide a notice justifying a fair share fee, then it cannot collect one.

Private Sector

***NLRB v. Oklahoma Fixture Co.*, 332 *F*.3d 1284 (10th Cir. 2003)**

Rehearing an National Labor Relations Board enforcement application *en banc*, the Court holds that a "permit fee," equal to union dues and paid by probationary employees during their second and third months of employment, did not violate 29 *U.S.C.* §186 barring an employer from paying a labor organization which represents its employees. The NLRB had held that the fees fell within the union dues exception of 29 *U.S.C.* § 186(c)(4). Setting aside the decision of a panel (295 *F.3d* 1143) which had declined to enforce the NLRB order, the court finds the NLRB's decision to be a reasonable construction of the statute. Observing that the union was obligated to represent the employees during their probationary periods, it enforced the NLRB order directing the employer to resume deducting the fees.

***UAW-Labor Employment and Training Corporation v. Chao*, 355 *U.S. App. D.C.* 460; 325 *F*.3d 360; (D.C. Cir. 2003), reh, en banc, denied 2003 *U.S. App. LEXIS* 19043 (D.C. Cir. 2003)**

A federal appeals court upholds the validity of *Executive Order 13201*, issued by President George W. Bush in 2001. The edict requires all employers performing US government contract work in excess of $100K to post notices at their facilities and those of subcontractors, informing employees of their rights under federal labor law not to join a union or to pay mandatory dues for costs unrelated to representational activities. *See Communications Workers v. Beck*, 487 *U.S.* 735, 754-63 (1988); *see also NLRB v. Gen. Motors Corp.*, 373 *U.S.* 734, 739-45 (1963). Besides informing employees of their *Beck* rights, the notice is also to tell workers how to contact the National Labor Relations Board for additional information.

Noting that the NLRB had held that an employer was not required to tell employees about *Beck* rights, a district court enjoined enforcement of the Executive Order, finding that its subject matter was preempted by the National Labor Relations Act.

The Court of Appeals reverses, holding that *E.O.* 13201 was not preempted. It differentiates an obligation to inform employees about their *Beck* rights from a prohibition against doing so, reasoning that the NLRB had not construed the NLRA to require that an employer remain silent about employees' *Beck* rights.